Supreme Court, U.S.
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No. 04-469

IN THE

Supreme Court of the United States

TOWN OF SURFSIDE,

Petitioner,

v.

MIDRASH SEPHARDI, INC., and
YOUNG ISRAEL OF BAL HARBOUR, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, MIDRASH SEPHARDI, INC.

SIMON SCHWARZ, ESQ.
801 Brickell Avenue, Suite 900
Miami, Florida 33131
(305) 610-3608

Attorney for Respondent,
Midrash Sephardi, Inc.

Wright Appellate Services, LLC
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

QUESTIONS PRESENTED

Section 2(b)(1) of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution in less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). The questions presented are:

I.

Is RLUIPA § 2 (b)(1), 42 U.S.C. § 2000cc(b)(1), *appropriate* legislation under Section 5 of the Fourteenth Amendment, which empowers Congress to enforce violations of the Free Exercise Clause by states and local governments, in that it closely tracks established non-discrimination principles of this Court's Free Exercise and Equal Protection jurisprudence and codifies those standards for greater visibility and easier enforceability?

II.

Did Congress "establish a religion" in RLUIPA § 2(b)(1) by merely requiring equality of treatment of analogous religious and secular assemblies or institutions in local land use regulations and in their implementation, without preferences or hindrances to either religious or secular land uses?

III.

Are plaintiffs required to satisfy the "substantial burden" requirement of RLUIPA § 2(a) as a threshold matter before an

"equal terms" violation can be found under Section 2(b), even though the text, the structure of RLUIPA § 2 as a whole and its legislative history clearly indicate that the two subsections are operatively independent of one another and the only two Courts of Appeals to consider this issue have so held?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Midrash Sephardi, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In its attempt to frame questions worthy of review where there are none, Surfside engages in wholesale misstatements of the decision of the Court of Appeals for the Eleventh Circuit, its own zoning regulations and the underlying facts. Surfside also distorts and greatly exaggerates the reach of RLUIPA § 2(b)(1)–the only RLUIPA provision at issue here-as "federalizing local land use laws," "substantially affecting *neutral* zoning laws throughout the nation" and "substantially altering decades of free exercise and equal protection precedent." Pet. p. 10. In fact, RLUIPA § 2(b)(1) does none of these things.

RLUIPA addresses two areas in which Congress determined that statutory enforcement of religious liberty interests against state and local governments is appropriate: land-use regulations and their implementation (§ 2) and actions relating to institutionalized persons in their custody (§ 3). In the land use context, Congress sought, among other things, to protect religious land uses from discriminatory zoning processes used to exclude or otherwise limit the location of churches and synagogues in municipalities across the country. Congress found "widespread" state and local discrimination against religious institutions by means of zoning regulations and witnesses presented "massive evidence" of a pattern of religious discrimination that frustrated a core aspect of religious exercise – the ability to assemble for worship. *See* Joint Statement of Senators Hatch and Kennedy, *146* Cong. Rec. S7774-01, S7774-75(2000); H.R. Rep. No. 106-219, at 21, 24 (1999). To this end, RLUIPA § 2(b), a new provision not found in the prior Religious Freedom Res-

toration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb to 2000bb-4, is directed at zoning codes that discriminate against, or among, religious institutions. 42 U.S.C. § 2000cc(b). *Id.*

The Eleventh Circuit held that in prohibiting the imposition or implementation of land use regulations in a manner that treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions, RLUIPA § 2(b)(1) "codifies the *Smith-Lukumi* line of precedent" and "Congress enshrined similar nondiscrimination principles in § 2(b)'s requirement that religious and nonreligious assemblies or institutions be treated equally." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214, 1231, 1233 (11th Cir. 2004). It therefore readily concluded that RLUIPA § 2(b)(1)-the only provision Surfside was found to have violated- is a straightforward constitutional exercise of Congress's authority under § 5 of the Fourteenth Amendment and does not violate the Establishment Clause. *Id.* at 1235-1242.

This is the first ruling by a Court of Appeals on the constitutionality of RLUIPA § 2(b)(1) and does not conflict with any decision of this Court. Nonetheless, Surfside erroneously points to *Cutter v. Wilkinson,* 349 F.3d 257 (6th Cir. 2003), *cert. granted,* 73 U.S.L.W. 3229 (U.S. Oct. 12, 2004) (No. 03-9877) as a source of circuit conflict that would warrant this Court's review. *See* Pet. p. 21.

Cutter involved an entirely different provision of RLUIPA-§ 3-which provides institutionalized persons with protection from substantial burdens on religious practice

unless the government can demonstrate that imposing the burden serves a compelling public interest and does so by the least restrictive means. 42 U.S.C. 2000cc-1. The Sixth Circuit declared that provision unconstitutional under the Establishment Clause and this Court will consider whether that provision, "which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control," is such a violation. 73 U.S.L.W. 3229. A similar provision in the land use context, RLUIPA § 2 (a), is not at issue here because the Eleventh Circuit held that Surfside did not violate that provision.

RLUIPA § 2 (b)(1) stands in stark contrast to § 3 or § 2 (a). It does not require the lifting of burdens or the providing of accommodations or preferences to religious land uses. It merely requires equality of treatment of analogous religious and secular entities in land use regulations. § 2(b)(1) is thus a model application of the neutrality principle embodied in both Religion Clauses-a principle it respects, not offends. Whatever its validity, *Cutter* is not inconsistent with the Eleventh Circuit's holding in this case.

COUNTERSTATEMENT OF THE CASE

Respondents, Midrash Sephardi and Young Israel of Bal Harbour, are two small Orthodox Jewish synagogues that share leased space at a second floor location in the business zoning district of the Town of Surfside, Florida. *Midrash*, 366 F. 3d at 1219-1221. Surfside's Zoning Code ("SZO") allows churches and synagogues only in one of eight designated districts-the "RD-1 two-family residential district"-and

only by way of a conditional use permit ("CUP") which requires prior approval of Surfside's Town Commission. *Id.* at 1219.

Midrash and Young Israel congregants are Orthodox Jews who are prohibited by their faith from using automobiles on their Sabbath. *Id.* at 1221.They must therefore live within walking distance of a synagogue. The RD-1 district is out of the normal walking range for a significant number of congregants, particularly the elderly, and is a barrier to their participation in congregational worship. *Id.*

Although churches and synagogues are prohibited in the business district, lodge halls and private clubs are permitted above the first floor. SZO § 90-152(b)(8), (18). *Id.* at 1220. A private club is broadly defined in the SZO as "a building and facilities or premises, owned and operated by a corporation, association, person or persons *for social, educational or recreational purposes,* but not primarily for profit and not primarily to render a service which is customarily carried on as a business." SZO § 90-2(20) (emphasis added). *Id.* at 1231. This definition, by its own terms, encompasses a broad spectrum of non-commercial, secular places of public assembly that serve the *social, educational or recreational* needs of Surfside's residents and tourists[1].

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[1] Ignoring the SZO definition of private clubs, Surfside falsely claims that "the business district also *excludes all other non-commercial assemblies of a 'public or semi-public character.'*"(emphasis supplied). Pet. p. 6.The citations to the rulings below bear out the falsity of this claim. As the Eleventh Circuit noted, under SZO § 90-41, "[c]onditional uses, which include

SZO § 90-152(a) states that its purpose is "to provide for retail shopping and *personal service*[2] needs of the town's residents and tourists" and that it is "intended to prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police." *Id.* at 1219-20. There appears to be no discernible reason why *religious* assemblies satisfy these articulated zoning objectives or, for that matter, any other factors normally cognizable in a zoning proceeding involving a commercial district, any less than *social, educational or recreational* assemblies.

In May 1999, Surfside initiated two state court actions against the Congregations which were removed to federal

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churches, synagogues, educational institutions, museums, off-street parking lots and garages, public and governmental buildings, and public utilities are "generally of a public or semipublic character . . . but because of the nature of the use and possible impact on neighboring properties, require the exercise of planning judgment. . ." SZO § 90-41(a). *Midrash*, 366 F. 3d at 1230, n.13. Thus, schools, museums, and governmental buildings, which presumably qualify as "institutions" under RLUIPA § 2(b), are the only assemblies or institutions that are specifically excluded from the business district because no conditional uses are permitted.

[2] Surfside again attempts to deceive this Court at Pet. p. 6 by misquoting and substituting "retail service" for "personal service" in its quote from SZO § 90-151(a) in an effort to explain away the exclusion of churches and synagogues as somehow being related to their non-commercial nature. *Compare Midrash,* 366 F. 3d at 1220 and Pet. Appx. I-147a.

court and subsequently dismissed without prejudice. *Id.* at 1222.

In July 1999, the Congregations filed suit under 42 U.S.C. § 1983, challenging SZO § 90-152 as discriminatory and unconstitutional under the Free Exercise and Free Speech Clauses of the First Amendment. *Id.* They also challenged the CUP requirement of SZO § 90-41 in the RD-1 district as an unconstitutional prior restraint on First Amendment rights. *Id.* Finally, the Congregations asserted that requiring their relocation to the RD-1 district would constitute a "substantial burden" on their free exercise rights under the Florida Religious Freedom and Restoration Act. *Id.* Surfside answered and filed a two-count counterclaim seeking declaratory and injunctive relief to enforce § 90-152 and to prohibit the Congregations from continuing at their current location, as well as civil penalties and attorneys fees. *Id.* at 1222.

In July 2000, Congress enacted RLUIPA, 42 U.S.C. § 2000cc, *et seq.*, which was signed into law on September 22, 2000. Shortly thereafter, the Congregations added a RLUIPA claim which asserted that SZO § 90-152's favorable treatment of private clubs and lodges relative to churches and synagogues violates the "equal terms" provision of RLUIPA (§ 2(b)(1)) and that the exclusion of synagogues from all of Surfside except the RD-1 district where many congregants can not walk on the Sabbath violated the "substantial burden" provision of RLUIPA (§ 2 (a)(1)). *Id.*

Both parties moved for summary judgment before and after RLUIPA became law. *Id.* The district court, in a series of

decisions, granted summary judgment in favor of Surfside on all seven counts of the Congregations' Third Amended Complaint, including all aspects of the Congregations' RLUIPA claim. *Id.* The district court also granted Surfside's counterclaim for an injunction. *Id.*

The Eleventh Circuit reversed, holding that SZO § 90-152, which permits private clubs and other secular assemblies but excludes religious assemblies from Surfside's business district, violates § 2(b)(1) of RLUIPA. *Id.* at 1219, 1231. The Eleventh Circuit held that, like a church or synagogue, a private club, as defined in SZO § 90-2(20), is an "assembly" within the meaning of RLUIPA § 2(b)(1) because it comprises a "group gathered for a common purpose[3]" *Id.* at 1230-31.

While noting that the Congregations' constitutional claims need not be reached "[b]ecause we sustain the congregations' RLUIPA challenge to the ordinance," *see id.* at 1219, n.1, the Eleventh Circuit found that the equal terms provision "codifies the *Smith-Lukumi* line of precedent."[4] *Id.* at 1233.

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[3] Because RLUIPA does not define "assembly," the circuit court construed that term in accordance with its ordinary or natural meaning.

[4] The Eleventh Circuit also held that the Congregations' CUP challenge was not yet ripe for review, *see id.* at 1224-25, and rejected the "substantial burden" challenge under RLUIPA §2(a)(1) on the grounds that "the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not

It therefore concluded that RLUIPA § 2 (b)(1) is a constitutional exercise of Congress's authority under the Fourteenth and Tenth Amendments and does not violate the Establishment Clause. *Id.* at 1219, 1235-1237.

REASONS FOR DENYING THE PETITION

In its decision, the Eleventh Circuit broke no new ground and presented no important or novel federalism concerns as Surfside claims, but closely tracked and codified established principles of this Court's Free Exercise and Equal Protection jurisprudence, in accordance with Congress' power under § 5 of the Fourteenth Amendment. This Court has noted that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). There is no reason for the Court to grant certiorari review and undertake that task at this early stage of the law's development, before any court of appeals has concluded that RLUIPA § 2 (b)(1) is unconstitutional. In any event, certiorari is not warranted because Surfside's constitutional and statutory challenges are without merit.

'substantial' within the meaning of RLUIPA." *Id.* at 1228. The Eleventh Circuit did not therefore rule on its constitutionality.

I. RLUIPA § 2(B)(1) IS APPROPRIATE LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Congress enacted RLUIPA following the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which struck down the "substantial burden" provision of RFRA, insofar as it applied to states and their municipalities, because Congress had exceeded its authority under § 5 of the Fourteenth Amendment by *substantively altering* and legislatively superceding this Court's interpretation of the Free Exercise Clause in *Smith* instead of simply *enforcing* the Clause. *Id.*, 521 U.S. at 532. RFRA was held not to be "appropriate" remedial legislation under §5, because there was no "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-20.

In reaching this conclusion, the *Boerne* Court noted that the "sweeping coverage" of RFRA ensured its "intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter", *id.*, 521 U.S. at 532, and that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise." *Id.* at 534. RFRA was therefore held to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *Id.* at 532.

RLUIPA § 2(b)(1), on the other hand, does precisely what RFRA did not. It simply codifies firmly-established neutral-

ity and general applicability principles of this Court's most recent Free Exercise jurisprudence in the land use context and does not attempt any substantive change in constitutional protections. "Each subsection [of RLUIPA] closely tracks the legal standards in one or more Supreme Court opinions codifying those standards for greater visibility and easier enforceability." 146 Cong. Rec. at S7775 A municipality's right to promulgate neutral zoning regulations of general applicability which reasonably restrict the location of churches and synagogues is simply not at issue here[5].

Surfside readily concedes that if RLUIPA § 2(b)(1) merely codifies existing constitutional principles, it is an acceptable use of Congress's § 5 remedial power under *Boerne* (Pet. p. 10), *but* grossly exaggerates the reach of RLUIPA § 2(b)(1). *See* p. 1, *supra.*

A. RLUIPA § 2(b) Merely Codifies the Free Exercise Clause's Prohibition Against Unequal Treatment In Land Use and Zoning Laws

In *Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), this Court abrogated the application of strict scrutiny to neutral laws of gen-

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[5] Similar to RFRA, the core provision of RLUIPA, § 2(a), protects religious assemblies and institutions from substantial burdens imposed on them by local land use and zoning regulations, subject, however, to various jurisdictional limitations that were designed to overcome RFRA's infirmities. However, the constitutionality of the "substantial burden" provision under § 5 is not at issue here.

eral applicability that incidentally burden religious exercise but sustained the long standing prohibition against a government banning conduct only when "engaged in for religious reasons," *see id.* at 877. *Smith* also noted that "we strictly scrutinize governmental classifications based on religion." *Id.* at 886 n.3 ((citations omitted).

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993), this Court explained that a law is "neutral" if it does not target or single out religiously motivated conduct either on its face or in its operation. *Lukumi,* 508 U.S. at 533-40. A law fails the "general applicability" requirement if it burdens religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated. *Id.* at 543-46[6]. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543.

Lukumi applied *Smith* to a series of city ordinances that effectively outlawed the ritual of animal sacrifice practiced by followers of the Santeria religion. Although these ordinances were found to be neutral on their face, a me-

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[6] "Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi,* 508 U.S. at 531.

ticulous examination of their effect in operation revealed that the ordinances were not neutral, singling out for prohibition only the killing of animals in Santeria rituals and excluding almost all other animal killings. *Lukumi,* 508 U.S. at 536-37. This selective operation of the ordinance "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons," causing religiously motivated conduct to be "singled out for discriminatory treatment." *Id.* at 537-38. Although the ordinances were claimed to advance two interests - preventing cruelty to animals and protecting public health- they were "underinclusive for [their asserted] ends" because they "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice does." *Id.* at 543. They were not therefore generally applicable. For the same reasons, the ordinances failed both the compelling interest and narrow tailoring prongs of strict scrutiny because their "proffered objectives [were] not pursued with respect to analogous non-religious conduct." *Id.* at 546.

The Eleventh Circuit noted that by requiring equal treatment of secular and religious assemblies in zoning laws, RLUIPA allows courts to scrutinize a zoning scheme and determine whether a particular system of classifications adopted by a city subtly or covertly departs from the *Smith-Lukumi* requirements of neutrality and general applicability. 366 F. 3d at 1232.

As in *Lukumi*, the Eleventh Circuit meticulously scrutinized SZO § 90-152 and found that excluding religious assemblies from its business district, while simultaneously

allowing a broad spectrum of non-commercial secular assemblies for *social, educational or recreational* purposes, was strong evidence that Surfside improperly targeted religious assemblies because of their religious mission. *Id.* at 1232-35. Additionally, the justification advanced by Surfside for its disparate treatment, that the Congregations have "[n]ever held a social, communal, public service or other community affair event which is *unrelated to [their] religious and spiritual mission or purpose"* constituted further evidence that Surfside treated secular motivations more favorably than religious motivations" in violation of the neutrality principle. *Id.*

Another strong indicator of the essential hostility toward religion inherent in this zoning scheme is the fact that Surfside's asserted interests of achieving maximum economic benefit through the promotion of retail "synergy" and the concentration and development of commercial uses in its small shopping district are seriously undermined by the SZO's definition of private clubs as non-commercial enterprises that operate for "social, educational or recreational purposes"-uses incompatible with the asserted commercial goals. *Id.* They are further undermined by evidence provided by the Congregations that they contribute to commercial activity and that permitted private clubs include organizations that often meet weekly, monthly, or bi-monthly, and sometimes during non-business hours – hours of operation which fail to stimulate any increase in consumer foot traffic. *Id.* Other than conclusory assertions by Surfside's land use expert that private clubs are more social than churches and therefore stimulates increased patronage of local establish-

ments, Surfside provided no evidence that private clubs and lodges *actually* contributed to the business district in a way appreciably different than religious institutions. *Id.* § 90-152 is therefore substantially underinclusive with respect to Surfside's claimed interests because lodges and private clubs endanger Surfside's commercial interests to at least the same degree as would religious assemblies that are prohibited. § 90-152 is not therefore generally applicable. *Id.*

The fact that SZO § 90-41 classifies churches and synagogues with "institutions" such as schools, museums, and governmental buildings and several other non-analogous entities, none of which are permitted in the business district, is of no consequence. *Id.* Even assuming that non-free standing religious "assemblies" on the second floor, over banks or other storefront businesses, are analogous to the listed institutions, § 90-152 is *substantially* underinclusive and not generally applicable because a broad spectrum of social, educational and recreational assemblies are permitted in the B-1 district, while religious assemblies are not. *Lukumi*, 508 U.S. at 543. "General applicability" is not synonymous with universal applicability and allows for some exceptions or deviations[7].

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[7] *Lukumi* explicitly disclaimed any intention of "defin[ing] with precision . . . whether a prohibition is of general application" because, in that case, the challenged ordinances fell "well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543. The "critical question" is "whether the circumference of legislation encircles a class so broad that it can

Finally, the underinclusiveness that subjected SZO § 90-152 to heightened scrutiny in the first place is the same reason why it fails strict scrutiny. *See Lukumi*, 508 U.S. at 546-47 (holding that "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling" and the law is not narrowly tailored where the "proffered objectives [were] not pursued with respect to analogous non-religious conduct.").

This Court has stated that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in *rare cases*." *Lukumi*, 508 U.S. at 546. Rather than providing for the unspecified *rare* exception, RLUIPA § 2(b)(1) simply "render[s] a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority." *Midrash*, 366 F. 3d at 1232.

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be fairy concluded that religious institutions could he thought to fall within the natural perimeter." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 696 (1970)(Harlan, J., concurring). Thus, a law is clearly neutral when it confers a benefit "upon a wide array of nonsectarian groups as well as religious organizations . .. ." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989). It is possible that in some particular case the breadth of RLUIPA's "equal terms" coverage may somewhat exceed the *Lukumi* standard.

B. Religion-Based Discrimination Is Also Prohibited By The Equal Protection Clause

RLUIPA Section 2(b)(1) also codifies existing Supreme Court precedent under the Equal Protection Clause. Contrary to Surfside's contention, this Court's cases are clear that a statutory classification overtly or covertly based upon religion, warrants strict scrutiny, and not rational basis, review. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 217 (1982); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A classification that categorizes on such basis warrants heightened review because it is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

C. To the Extent That RLUIPA § 2 Incidentally Prohibits Any Constitutionally Permissible Conduct, It Prohibits Actions That Themselves Have "A Significant Likelihood Of Being Unconstitutional," Is Within Permitted Broader Swath and Is Congruent and Proportional to the Pattern of Religious Discrimination Documented by Congress

The Eleventh Circuit held that SZO § 90-152 violates RLUIPA § 2(b)(1) as well as the First and Fourteenth Amendments. *Midrash*, 366 F. 3d at 1234-35, 1238-39. A broad review to determine the extent, if any, that RLUIPA § 2(b)(1) exceeds the Constitution under some other set of cir-

cumstances would be inappropriate. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

However, even if this Court were to find that RLUIPA § 2(b)(1) may marginally extend beyond the bounds of Free Exercise Clause protections in some other case other than the one at bar, such as the rare case where a law that is not of general application survives strict scrutiny or where RLUIPA's "equal terms" coverage is found to somewhat exceed the "general applicability" standard not "defined with precision" in *Lukumi*, § 2(b)(1) is still an acceptable use of Congress's § 5 remedial tool because it prohibits discriminatory actions that themselves have "a significant likelihood of being unconstitutional." *Boerne*, 521 U.S. at 532.

Moreover, it is firmly established that the power to enforce the Amendment also allows Congress to prohibit a "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," as long as such "prophylactic" legislation is "congruent" and "proportional" to the injury to be prevented or remedied. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81 (2000) (*citing Boerne*, 521 U.S. at 518); *Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) [8].

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[8] In the racial discrimination context, for example, this Court has upheld provisions of the Voting Rights Act that prohibit practices and procedures resulting in discriminatory impact, without proof of intentional discrimination, as required by the Equal Protection Clause, on this basis. *See, e.g., Chisom v. Roemer,* 501 U.S. 380, 383-84 (1991); *City of Rome v. United States,* 446 U.S. 156, 177

Finally, in enacting RLUIPA § 2(b)(1), Congress identified a pattern of religious discrimination by the States and their municipalities in the land use area and a pattern of constitutional violations. *See* Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7774-75 (2000). Unlike in *Garret*, the substantial record that Congress developed amply demonstrates that the Act is congruent and proportional to the injuries it seeks to remedy. Surfside's attempt to minimize the weight of this record is not only unfounded but also unavailing. Unlike in *Garret*, the importance of the legislative record is greatly diminished here by the fact that the challenged statute prohibits very little unconstitutional conduct. RLUIPA § 2(b)(1) is thus "appropriate legislation" under §5 of the Fourteenth Amendment[9].

(1980); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971). That entails a far broader swath of conduct than at issue here.

[9] Similarly, when Congress engages in a constitutional use of its power under § 5 of the Fourteenth Amendment, the Tenth Amendment does not reserve that power to the States.*See New York v. United States*, 505 U.S. 144, 156 (1992). Nor does RLUIPA regulate the states or compel their enforcement of a federal regulatory program, *see Printz v. United States*, 521 U.S. 898, 935 (1997). It simply leaves individual states free to eliminate discrimination against religious institutions in any way they choose, so long as the discrimination is actually eliminated. *See Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 759 (1982).

II. RLUIPA § 2 (b)(1) DOES NOT ESTABLISH A RELIGION BY MERELY REQUIRING EQUALITY OF ZONING TREATMENT OF ANALOGOUS RELIGIOUS AND SECULAR ENTITIES, WITHOUT PREFERENCES OR HINDRANCES

A. Law Requiring Equal Zoning Treatment Does Not Violate the Neutrality Principle

Contrary to Surfside's contentions, RLUIPA § 2 (b)(1) does not give religious land uses any preferred zoning status. It does not give them the unfettered right to locate in any zoning district they desire regardless of whether other assemblies or institutions are permitted there. It merely requires that religious land users not be prohibited from operating on an even playing field with other users as mandated by the Free Exercise Clause. The Establishment Clause does not as a general matter forbid what the Free Exercise Clause requires.

Indeed, in a series of cases dealing with the issue of public educational institutions giving religious organizations equal access to fora they created to facilitate private (as opposed to school-sponsored, speech) by a broad array of private groups, this Court has repeatedly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839,

845-46 (1995) (university program subsidizing broad array of student activities); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-120 (2001) (use of school facilities by community groups); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384,384-397 (1993) (same). *See also Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (allowing religious schools to receive government tuition vouchers on equal basis with secular schools reflects neutrality required by Establishment Clause).

Indeed, neutrality is the hallmark of both Religion Clauses. "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (internal quotations and citation omitted). Neutrality is thus respected, not offended, when RLUIPA requires zoning laws to be as hospitable to religious assemblies as to like secular assemblies, free of government sponsorship or interference.

In cases involving prayer in public schools, the so-called "endorsement" test applied by this Court is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Wallace v. Jaffree,* 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment); see also *Capital Square Review and Advisory Bd.* v. *Pinette,* 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment). There is no realistic danger that an objective observer, acquainted with the

Free Exercise Clause and the values it promotes, would perceive a law that requires equal treatment of like religious and secular assemblies in zoning regulations, otherwise being operated free of any government involvement, as a government endorsement of religion or any particular creed or a particular religious practice. *See Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

RLUIPA § 2(b)(1) also easily satisfies the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that (1) it has the appropriate, secular legislative purpose of preventing religious intolerance in the enactment or implementation of land use or zoning regulations, as does the Free Exercise Clause, (2) it cannot fairly be said to amount to government advancement of religion through the government's own activities or influence and (3) it does not foster any kind of government entanglement with religious affairs.

B. There Is No Circuit Conflict on This Issue

Contrary to Surfside's suggestion, no other court of appeals has even addressed the constitutionality of RLUIPA § 2(b)(1) under the Establishment Clause, much less declared it unconstitutional. This Court recently granted certiorari in a case raising this issue under the "substantial burden" provision of RLUIPA § 3 in the prisoner context. *See Cutter v. Wilkinson,* 349 F.3d 257 (6th Cir. 2003), *cert. granted,* 73 U.S.L.W. 3229 (U.S. Oct. 12, 2004) (No. 03-9877).

As pointed out at pp. 2-3, *supra*, *Cutter* involves a very different provision than the one at issue here. *Cutter* held that the "substantial burden" provision of RLUIPA § 3 "has the effect of impermissibly advancing religion by giving greater

protection to religious rights than to other constitutionally protected rights," 349 F.3d at 264, and also "of encouraging prisoners to become religious in order to enjoy greater rights". *Id.* at 266. Regardless of its validity, the Sixth Circuit's reasoning in *Cutter* is manifestly inapplicable to the "equal terms" provision of § 2 (b)(1). The latter provision does not give religious land uses any preferred zoning status but merely requires equality of zoning treatment of analogous religious and nonreligious entities. It can not be said to have the effect of giving religious assemblies zoning rights superior to those of nonreligious assemblies or of encouraging nonreligious assemblies to become religious in order to enjoy greater rights. *Cutter* is thus not in conflict with the Eleventh Circuit's holding in this case.

III. SATISFYING RLUIPA'S SUBSTANTIAL BURDEN TEST (§2(a)) IS NOT A STATUTORY PREREQUISITE TO A VIOLATION OF THE EQUAL TERMS PROVISION (§ 2(b)(1))

Surfside argues that to reach § 2(b)(1)'s "equal terms" provision the court must first make an initial finding that the SZO "substantially burdens" the synagogues' religious rights under § 2(a), and that the Court of Appeals found that it did not. Surfside then misquotes fragments of RLUIPA's legislative history as supporting this facially absurd proposition. In fact, the Eleventh Circuit construed § 2 (b)(1) in accordance with its plain text, the structure of § 2 as a whole, its legislative history and a prior ruling of the Seventh Circuit.

The Eleventh Circuit considered but did not reach a related question of statutory construction it raised *sua sponte*:

whether § 2(a)(2)'s threshold jurisdictional tests must be satisfied before § 2(b)'s equal terms provision applies, because it found that the congregations allege conduct satisfying the third jurisdictional prong of § (a)(2). It noted, however, that "the plain terms and structure of RLUIPA indicate that the jurisdictional prerequisites included in § 2(a) do not apply to § 2(b)'s prohibition on discrimination against and exclusion of religious institutions."

The question presented here by Surfside was neither raised before nor considered by the Court of Appeals[10] nor the District Court, and this Court should therefore not consider it. *See Pennsylvania Department Of Corrections et al . v. Yeskey*, 524 U.S. 206, 212-213 (1998).

Second, this argument lacks any merit and is contrary to the holdings of the two Courts of Appeals that have considered this issue. The words "substantial burden" do not appear in § 2(b) expressly, by reference or by implication. Although statutory phrases should not be read in isolation but rather with a view to their place in the overall statutory scheme," s*ee FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), "[i]t is generally presumed that Congress

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[10] In its brief to the Eleventh Circuit not included in the Petitioner's Appendix, Surfside argued that its "zoning ordinances do not violate the 'unequal terms' provision of RLUIPA because there are no private clubs in the tourist or business districts; furthermore, private clubs are not 'similarly situated' with churches and synagogues; and even if private clubs could be viewed as 'similarly situated' there is a rational basis for distinguishing between private clubs and churches and synagogues."

acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," s*ee, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538 (1994). Read in context, it is clear on the face of the statute that "the substantial burden [§ 2(a)] and nondiscrimination [§ 2(b)] provisions are operatively independent of one another." *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 762 (7th Cir. 2003). The Eleventh Circuit also agreed with this construction and no other Court of Appeals has held otherwise. Indeed, Surfside's reading of the statute would eviscerate the need for § 2(b) which requires proof of "discrimination" or "unequal terms", since, under § 2(a), the required proof of a "substantial" burden is sufficient to invalidate an offending land use regulation except perhaps in the *rare* case where strict scrutiny is met.

Moreover, RLUIPA's legislative history makes this explicit. See Statement of Rep. Canady, 146 Cong. Rec. E1563 (2000), H.R. Rep. 106-219, at 17 ("Section 2(b)(1) and (2).....directly address some of the more egregious forms of land use regulation, and *provide more precise standards than the substantial burden and compelling interest test.*"). *See also* Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775 ("The Act's protection for religious liberty.....is triggered only by a substantial burden on, *a discrimination against*, a total exclusion of, *or* an unreasonable limitation on the free exercise of religion.")(emphasis added).

In sum, Surfside's untenable construction of § 2(b)(1) is clearly contrary to the text and legislative history of RLUIPA and the holding of the two Courts of Appeals that have con-

sidered the issue. It does not merit this Court's further review.

CONCLUSION

For the foregoing reasons, Surfside's petition for a writ of certiorari should be denied.

Respectfully submitted,

Simon Schwarz, Esq.
801 Brickell Avenue,
Suite 900
Miami, Florida 33131
Phone: 305-610-3608

Attorney for Respondent
Midrash Sephardi, Inc.

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